

STATEMENT OF MARK H. LYNCH
ON BEHALF OF
THE AMERICAN CIVIL LIBERTIES UNION

ON H.R. 5164

BEFORE THE
SUBCOMMITTEE ON GOVERNMENT INFORMATION, JUSTICE, AND AGRICULTURE
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS
MAY 10, 1984

Mr. Chairman:

Thank you for your invitation to the American Civil Liberties Union to testify on H.R. 5164. The ACLU is a nonpartisan organization of over 250,000 members dedicated to defending the Bill of Rights. The ACLU regards the Freedom of Information Act as one of the most important pieces of legislation ever enacted by Congress because the Act positively implements the principle, protected by the First Amendment, that this nation is committed to informed, robust debate on matters of public importance. Accordingly, the ACLU is extremely wary of all proposals to amend the FOIA. This is especially true with respect to the CIA, for the FOIA has been a significant part of a larger process over the past ten years of bringing that Agency under public and congressional scrutiny. While maintaining this skepticism, we have concluded after long and careful consideration of H.R. 5164 that this bill will be a gain for public access to CIA information and we therefore support the bill.

Anyone who has made an FOIA request to the CIA knows that the wait for a substantive response is intolerable -- two to three years. There is good reason to believe that this delay is primarily due to the amount of time that it takes to review

records in the Agency's operational files. We also know from nearly ten years of litigation with the CIA that, with very few exceptions, documents from operational files, as that term is narrowly defined in the bill, are exempt under the provisions of the FOIA and that the courts do not order the release of such information. (In some instances, the CIA has released documents from operational files with everything deleted but random words that have no meaning, and therefore we do not regard these releases as meaningful.)

These factors suggest that if operational files are exempt from routine search and review, with exceptions to cover substantive material which is now released, the delay in responding to requests will be reduced and no meaningful information which is currently released will be lost. Accordingly, we took the position that if both these conditions were met -- improved service and no loss of currently available information -- we would support legislation to exempt CIA operational files from routine search and review. We believe that H.R. 5164 meets these tests and should be enacted.

Operational files are defined in the bill as: (1) files in the Directorate of Operations "which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services;" (2) files in the Directorate for Science and Technology "which document the means by which foreign intelligence or counter-

intelligence is collected through scientific and technical systems;" and (3) files in the Office of Security "which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources." The Report of the House Intelligence Committee makes clear that the files in these three components covered by these definitions "concern the intelligence process as distinguished from the intelligence product."

Files within these three components which do not meet the statutory definitions will not be eligible for exemption from search and review. Furthermore, records in all other parts of the CIA, including information which originated in the operational components, will continue to be subject to search and review. For example, all documents which go to the Director of Central Intelligence, even if they concern the most intimate details of an operation, will be subject to search and review. Furthermore, all intelligence collected through human and technical means will continue to be covered by the FOIA because the operational components forward such information to the analytic components of the Agency. What will be exempt from search and review is information about how intelligence is collected -- for example, how a source was spotted and recruited, how much he is paid, and the details of his meetings with his case officer. Such information is invariably exempt from disclosure under the FOIA and will continue to be exempt under any conceivable standard for classification.

In some instances, collected intelligence is so sensitive that it is disseminated to analysts and policy-makers on an "eyes only" basis and then returned to the operational component for storage. To cover these situations and to guard against the possibility of an expansion of this practice to circumvent the intent of this legislation, the bill also includes a proviso that files maintained within operational components as the sole repository of disseminated intelligence cannot be exempt from search and review.

The bill provides for three circumstances in which operational files will be subject to search and review. First, information about covert operations in operational files will be subject to search and review if the fact of the existence of the operation is not exempt from disclosure under the FOIA. This provision codifies well-established case law that in some instances the existence of such operations can be properly classified. However, if the existence of a covert operation is not properly classified, the Agency will be required to review all its records concerning the operation.

Second, any information in operational files which concerns the subject matter of an investigation for impropriety or illegality in the conduct of an intelligence activity will be subject to search and review. Such investigations may be conducted by the Agency's Inspector General or General Counsel, by the congressional oversight committees, or by the President's Intelligence Oversight Committee. It is important to note from the legislative history of the bill that the CIA undertakes investigations whenever it

receives an allegation of illegality or impropriety from any member of the public, except where the individual has repeatedly made frivolous allegations. The House Intelligence Committee Report makes clear that "frivolous allegations" are those such as "the CIA is manipulating by brain waves."

Whenever such an investigation is conducted, all information concerning the subject matter will be subject to search and review even if the investigators did not review the particular documents. This is an important improvement over the Senate bill which reaches only information that was reviewed or relied on in the course of an investigation.

This provision on the subject matter of investigations is very important for two reasons. First, for historical purposes, it insures that all information concerning the abuses that were addressed by the Church and Pike Committees will continue to be accessible. Second, if future abuses come to light, the public -- acting either on its own or through the congressional oversight committees -- can trigger investigations which will make relevant information in operational files subject to search and review. Thus, the bill insures that operational files cannot be used to hide information on improper and illegal activities of the CIA.

Third, the bill requires that operational files must be searched in response to requests by United States citizens and permanent resident aliens for information about themselves. This provision recognizes the importance of the right of individuals to be able to seek information about themselves in all CIA

files and also preserves the degree of access currently afforded by the Privacy Act.

In hearings before the House Intelligence Committee, we urged the Committee to consider whether the concept of first-person requests should be broadened to include United States political, religious, academic, and media organizations. The Committee staff investigated this issue carefully and found that it is very difficult to identify the nature of organizations from the CIA's indices without actually reviewing the files. Consequently, the Committee concluded that including organizations within the scope of first-person requests would require extensive file searches and thus jeopardize the goal of eliminating the delay in processing FOIA requests.

We are willing to live with this judgment because of the proviso in the bill that requires the CIA to search operational files for the subject matter of an investigation. Under this proviso, an organization that suspects it is being improperly used or targeted by the CIA can request an investigation, and the information concerning that investigation will be subject to search under the FOIA. Consequently, we believe that the interests of organizations involved in First Amendment activity are adequately protected by this bill.

The bill also contains a provision to insure that information in operational files will not necessarily be exempt from search and review forever. Every ten years the CIA is required to review its operational files to determine whether files, or

portions of files, of historic value or other public interest can be removed from exempt status and made subject to search and review. As an example of this process, the CIA has already assured the Senate Intelligence Committee that the files of the OSS, which are currently maintained by the Operations Directorate, will not be exempt from search and review. Another provision of the bill also requires the Agency, in consultation with the Archivist, the Librarian of Congress, and historians selected by the Archivist, to submit a report to Congress by June 1, 1985, on the feasibility of reinstituting systematic declassification reviews of historically significant information. Although this provision is not directly connected to the FOIA, it responds to the complaints of historians over the Reagan Administration's elimination of systematic declassification reviews.

In the area of judicial review, the House bill is a marked improvement over the Senate bill. In hearings last June before the Senate Intelligence Committee, the CIA took the position that there should be no judicial review of whether a particular file meets the definition of operational or whether particular documents are improperly placed solely in operational files. The Committee, at our urging, rejected this position and insisted on judicial review. However, the Senate bill and the accompanying report left some confusion over whether the standard of review was de novo, as under the FOIA, or a more generous arbitrary and capricious standard. H.R. 5164 resolves this confusion by making it crystal clear that review is de novo. The bill

also codifies certain litigation procedures concerning the parties' submissions, discovery, and in camera proceedings that do not depart from the practices which the courts currently apply in FOIA cases involving classified information.

The House bill also contains an improvement over the Senate bill with respect to the issue of retroactivity. The provisions of both bills will cover all requests pending at the administrative stage on the date of enactment. This provision makes sense because if the bill had only prospective effect, it would take another two to three years to eliminate the backlog and thus defeat one of our principal interests in this legislation. However, the House bill, unlike the Senate bill, does not apply retroactively to any lawsuit which was pending on February 7, 1984. This date was selected because it was the day before the hearings before the House Intelligence Committee where members of the Committee expressed opposition to the retroactivity provision of the Senate bill. To avoid a rush to the courthouse, the Committee chose that date rather than the date of enactment as the cut-off point.

For the foregoing reasons we believe that this bill will not enable the CIA to withhold any meaningful information which the Agency is now required to release or which it would be required to release under any conceivable standard for classification. Furthermore, the Director of Central Intelligence has provided the House Intelligence Committee with a written assurance that he will establish a specific program of measures to speed up the processing of FOIA requests. The Director has also agreed

not to reduce the current budgetary and personnel allocations for FOIA processing for the first two years after enactment of the bill so that the resources now devoted to processing operational files will be devoted to eliminating the backlog in processing requests for all other information. Another positive effect of the legislative process which has produced this bill is that the two intelligence committees and their staffs have become intimately familiar with and interested in the administration of the FOIA at the CIA. Consequently, we can expect vigorous oversight in this area and attentive follow-through to insure that the CIA delivers on its promises to improve FOIA processing.

Since both our criteria for this legislation have been met, we support H.R. 5164 and urge its prompt enactment without further amendment. Furthermore, we must stress that any movement away from what has been achieved in H.R. 5164 would be unacceptable, and we would oppose any tinkering with this bill in a House-Senate conference. Since the CIA supports H.R. 5164 as it is, there should be no obstacle to enacting the bill without the need for a conference.

Thank you Mr. Chairman.